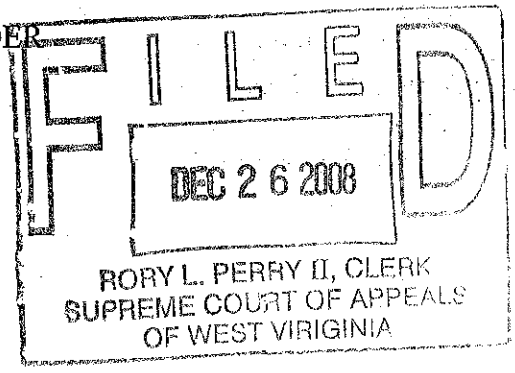
NO. 081462

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT, WAUNONA MESSINGER CROUSER, REBECCAH MORLORK, ANTHONY BEEZEL, MARY ELLEN MONTGOMERY, MARY LUZADER and TRUMAN R. DESIST, individuals residing in West Virginia, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.



E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION, a dissolved West Virginia corporation, MATTHIESSEN & HEGELER ZINC COMPANY, INC., a dissolved Illinois corporation formerly doing business in West Virginia, NUZUM TRUCKING COMPANY, a West Virginia corporation, T. L. DIAMOND & COMPANY, INC., a New York corporation doing business in West Virginia, and JOSEPH PAUSHEL, an individual residing in West Virginia,

Defendants.

BRIEF OF APPELLEE T.L. DIAMOND & COMPANY, INC.

INTRODUCTION

This appeal involves a straightforward question of contract interpretation. The sole issue is whether Petitioner E.I. DuPont de Nemours and Company ("DuPont") breached its obligations to appellee T.L. Diamond and Co., Inc. ("TLD") under the Environmental and Sale Agreement dated October 29, 2001 between DuPont and TLD (the "Agreement") by failing to take responsibility for the plaintiffs' claims herein or to indemnify TLD when it was forced to

defend this matter. A plain reading of the Agreement reflects that DuPont agreed to be "solely liable" and to defend and indemnify TLD in very broad terms for all claims relating to the environmental condition of the site, including but not limited to the offsite migration of soil, sediment, groundwater or surface water from the facility -- precisely the type of claim made by the plaintiffs herein.

A centerpiece of DuPont's defense below, and on its appeal from the verdicts rendered at trial, has been that it alone shouldered responsibility to clean up the Spelter Smelter site. That it did so, however, was substantially a function of the allocation of responsibility for liabilities set forth in the Agreement. DuPont, however, does not really want to bear, as the Agreement required, "all liabilities" but, instead, prefers to pick and choose among them. Hence, it now takes the position that the Agreement that required it to assume the third party liability to the government arising from environmental conditions relating to the Spelter site somehow did not require it to assume third party liability to private plaintiffs that also arose from environmental conditions relating to the Spelter site. That inconsistency accords with neither logic nor the express language of the Agreement.

In short, this appeal is about whether DuPont preserved a contractual right to walk away when the going gets tough. The language in the Agreement, both broad in coverage and specific as to DuPont's obligations, does not grant that option. Thus, for the reasons set forth below, appellee T.L. Diamond and Company, Inc. respectfully submits that the judgment of the Circuit Court in this specific matter be affirmed.

Review of Relevant Facts and Proceedings Below

A. Statement of Additional Environmental Facts

Although facts outside of the Agreement are not necessary for resolution of this appeal, and indeed are inappropriate under the parol evidence rule, DuPont's arguments proceed from and rely upon a statement of facts that suffers from both material omissions and inaccuracies. Rule 10(d) of the West Virginia Rules of Appellate Procedure directs that the appellee's brief "shall point out any alleged omissions or inaccuracies of the appellant's statement of the case." Accordingly, TLD respectfully presents this limited statement of facts to point out the most significant omissions and inaccuracies of DuPont's statement of facts.

1. Plant Operations

In early 1972, when TLD closed on its acquisition of the Spelter plant facilities (but not the area comprising "the pile"), there were no operations at Spelter carried on by the then owner, Mathiessen & Hegler ("M&H") and the plant had been mothballed for over a year. [Tr. 2060] Later in 1972, TLD began operations, which continued until the plant was shuttered in 2001.

The vast majority of production activity during the periods of operation, first by Grasselli, then DuPont and finally M & H, involved primary zinc smelting – the conversion of zinc-bearing ores mined from the earth into a relatively pure form (usually in bars) through a complex process that separates zinc from the many other constituents in the ore. Early on, this involved the use of horizontal retort furnaces and later, vertical retort furnaces. [Tr. 1066-1069]

One critical aspect of primary zinc smelting is the creation of considerable waste – the residue of ore, coke and other by-products. Grasselli, DuPont and M&H each deposited these residues, often still extremely hot, in an area south of the plant. [Tr. 1101] The

accumulation of these materials created, over the period up to 1971, the tremendous "pile" that has been a key focus of this litigation. TLD acquired this area in 1974. [Tr. 1062; 1078-1081] Another important by-product of primary zinc smelting was significant airborne waste from various sources, including smoke stacks, out buildings, the pile and erosion of soils on the site -- the nature and composition of which likewise formed a major part of the evidence given at trial. [Tr. 1133; 1396; 2052; 2080-2082; 2100; 3555-3556]

A small portion of the plant was given over to separate facilities dedicated to the production of zinc dust, used primarily in the production of paints and tires. While primary zinc smelting involves conversion of ores into zinc, secondary smelting to create zinc dust converts highly refined feed sources, both processed scrap and zinc slabs, into a fine, pure zinc powder. [Tr. 1415] This conversion process was entirely different from the primary zinc smelting that went on for 60 years before 1972; it generated very little waste, other than the reusable retorts that were part of the zinc dust production process, and none of the residue materials that accumulated into the massive pile at the site. [Tr. 2942; Ex. 5086].

Although the trial record included stray references to emissions issues during the 1972-2001 secondary zinc processing period, neither side offered any proof of the amount, composition or toxic character of the emissions from operations during that time. Indeed, the analysis of contamination patterns from the site which formed the foundation for plaintiffs' causal link between the site and the class area related solely to contamination occurring prior to 1972. [Tr. 1396-1405; 1415-1417] In other words, the only scientific evidence that the Spelter facility contributed to contamination in the class area consisted of expert testimony and analysis regarding primary zinc smelting operations up to 1971; neither plaintiffs nor DuPont adduced

scientific or other evidence to the effect that the property or prospective health of class members was affected by secondary zinc processing that occurred during the period of TLD's ownership.

DuPont's brief, however, misleadingly reveals only that TLD owned and operated "the plant" from 1971-2001. And while DuPont dwells at length on the difference between the use of horizontal as opposed to vertical retorts in the primary zinc smelting operations, its papers are devoid of the more fundamental difference between the processing of contaminant-laden ores through primary smelting and the conversion of refined scrap and pure zinc slab into zinc dust. Nor does DuPont suggest that TLD's operations contributed to the "pile" or its related smoke or fire condition since the pile was comprised of hot residue from the primary zinc smelting operations of DuPont (and its predecessor by merger, Grasselli) and later M&H. These fundamental distinctions are perhaps the only important environmental facts relating to the site that are germane to understanding the Agreement.

DuPont's recitation of facts fails to acknowledge several key elements of the Agreement itself. First, while the Agreement transferred ownership of the site, DuPont paid nothing for the property. Rather, it was TLD that paid DuPont $200,000, money DuPont agreed to devote to remediation. (See Environmental and Sale Agreement, TLD 203807 at ¶12.) Second, the Agreement allocated to DuPont all responsibility for environmental liability in connection with the site (defined as the "Real Property"), past, present or future. Finally, DuPont characterizes its clean-up as "voluntary," it was in fact required to perform the clean-up pursuant to paragraph 9 of the Agreement: "9. From and after the closing date, DuPont shall take at its sole expense all actions necessary to comply with the voluntary remediation Agreement and the NPDES Permit and Consent Order as well as to comply with any federal, state, or local environmental law..." (TLD 203807)

B. Statement of Additional Facts as to Proceedings Below

As DuPont notes in its brief, , TLD entered into an agreement with plaintiffs in November, 2006 that would allow TLD to cease active defense of the action through trial and minimizing the expense to a company no longer in active business. Among other things, this agreement contemplated an assignment to plaintiffs of TLD's rights of indemnity against DuPont in the event that plaintiffs ultimately won a judgment from TLD. Insofar as the jury below did not find that TLD bore any responsibility to plaintiffs under any theory, no such judgment was entered against TLD and, accordingly, this precondition to an assignment has not occurred. The Circuit Court ultimately approved the agreement between TLD and plaintiffs on May 7, 2007 following briefing from the parties.

Shortly thereafter, on June 14, 2007, the Court advised the parties of its Trial Plan with respect to all aspects of the case. Having found in its May 7, 2007 order that the issues relating to the TLD/DuPont Agreement were distinct from the myriad other issues relating to plaintiffs claim, the Circuit Court's Trial Plan determined that, in the event that plaintiffs prevailed in any of the prior phases, the Court itself would consider the indemnification and related issues in Phase V, the last phase prior to consideration of an award to plaintiffs' counsel of attorney's fees. The Trial Plan stated, however, that if any party showed, prior to trial, that there was an ambiguity in the Agreement, the Court would then consider whether to retain the jury to resolve such issues. DuPont correctly notes that plaintiffs thereafter successfully moved for summary judgment with respect to TLD's right to indemnity for any liability to them and that DuPont's motion seeking a determination by summary judgment that it had no such obligation was denied. Regrettably, DuPont fails to note that its motion for summary judgment was the first on the indemnity question, preceding – and prompting – the plaintiffs' motion on this issue. Thus, it

was DuPont's affirmative action of filing a motion for summary judgment that resulted in a pre-trial decision on the indemnity issue. Although DuPont contends on appeal that the Court's ruling severely prejudiced its trial strategy, it did not assert such prejudice prior to trial.

Argument

A. The Agreement Provides for Indemnification of TLD by DuPont

Issues of contract interpretation involve questions of law for the Court. Franklin v. Lilly Lumber Co., 66 W. Va. 164, 66 S.E. 225, (1909); ("it is the province of the court, and not the jury, to interpret a written contract"); Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937); *See also,* Charter Communications VI, LLC v. Eleazer, 412 F. Supp. 2d 588, 591 (S.D. W.V. 2006), *citing*, Topping v. Rainbow Homes, Inc., 200 W. Va. 728, 733, 490 S.E.2d 817, 822 (1997). The standards the Court has determined should guide it in interpreting a contract are straightforward. The "traditional rule of contract interpretation is that a valid written agreement using plain and unambiguous language is to be enforced according to its plain intent and should not be construed." Toppings, supra.

That all of the parties agree on these principles but do not agree on the meaning of the Agreement does not render the agreement ambiguous; it only means that the parties disagree as to its proper interpretation. International Nickel Co., v. Commonwealth Gas Corp., 152 W.Va 296, 163 S.E.2d 677 (1968). Thus, the only question is: what does the contract say – does it require DuPont to take responsibility for and, if needed, indemnify TLD from the liability asserted here by the plaintiffs? This question breaks down into two parts: was there an obligation to indemnify and does that obligation extend to the liability to which TLD is exposed in this action.

Paragraph 5 of the Agreement provides, in pertinent part, that "as between TLD and DuPont, DuPont shall be solely liable for the past, current and environmental condition of the Real Property, including, but not limited to… any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property."[1] (TLD 203807)

Paragraph 6 provides, in pertinent part, that " DuPont shall release TLD… from and against any and all losses, claims, demands, liabilities, obligations, causes of action, damages, costs, expenses fines or penalties (including, without limitation, attorney and consultant fees) arising out of the past, current or future environmental condition of the Real Property, including, but not limited to … (c) any liabilities related to the off-site migration of soil, sediment groundwater or surface water from the Real Property…" (TLD 203807)

Paragraph 8 renders DuPont "solely liable for the defense of TLD" in the event that DuPont takes action to include, or that leads any other person to include, TLD in any judicial or administrative proceeding relating to a Released Claim as defined. (TLD 203807)

Finally, Paragraph 9 provides that, "[f]rom and after the Closing Date, DuPont shall take at its sole expense all actions necessary to comply with "any federal, state or local environmental law applicable to . . . the investigation or remediation of the migration of soil, sediment, groundwater or surface water from the Real Property." (TLD 203807)

While DuPont seeks to place indemnification agreements in a special class of contracts, this Court has held that particular language, including the word "indemnify," is not required in order for a contract to impose an obligation of indemnification. An indemnity

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1 TLD retained only liability for "any government imposed fines or penalties for violations of law by TLD unrelated to the environmental conditions through the Voluntary Remediation Agreement and the NPDES Permit & Consent Order." (TLD 203807) DuPont makes no argument that the claims herein fall within this retained liability.

agreement is, at bottom, a contractual allocation of risk. Dalton v. Childress Service Corp., 189 W.Va. 428, 431, 432 S.E.2d 98, 101 (1993); Riggle v. Allied Chemical Corp., 180 W.Va. 561, 568, 378 S.E.2d 282, 289 (1989). Thus, the task at hand is to determine whether the Agreement contains such an allocation of risk and, if so, what that allocation was comprised of.

It would be difficult to imagine an agreement that more expressly and definitively allocated responsibility of the risk of liability than the Agreement at issue here. DuPont and TLD agreed that "as between TLD and DuPont, DuPont shall be solely liable" for specified risks. Certainly this is how DuPont has interpreted and applied the agreement since it has repeatedly emphasized, from and after the Agreement, that it undertook and paid for the clean-up of the Site. That clean-up, however, was pursuant to a legal obligation owed to a third-party, the West Virginia Department of Environmental Protection and avoided possible exposure to claims from the U.S. Department of Environmental Protection under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") as had been threatened.

But, faced with this lawsuit, which represented a potential third party liability of a different magnitude, DuPont changed its position, construing Paragraph 5 to be a meaningless -- and toothless -- provision. Although Paragraph 5 provides that "...DuPont shall be solely liable for the past, current and environmental condition of the Real Property...,"under DuPont's current interpretation, Paragraph 5 allocated no liability to it and DuPont could walk away, as it now has done, without recourse. DuPont's position would render the imposition of that liability "solely" on DuPont to be meaningless language of no effect. That is improper: "'no part or word in [a written instrument] can be ignored, disregarded, treated as meaningless or denied purpose and effect unless there be irreconcilable contradiction and repugnancy.'" Diamond v. Parkersburg-

Aetna Corp., 146 W.Va. 543, 553, 122 S.E.2d 436, 442 (1961), *quoting*, State v. Harden, 62 W.Va. 313, 58 S.E. 715(1907).

When the party to whom an allocation of risk refuses to accept that responsibility such that the party transferring the risk is forced to bear it, indemnity is the remedy and the only way, in such an event, to give the allocation language meaning. That is what is sought here: enforcement of DuPont's obligation to bear liabilities under the Agreement, in particular those specified in Paragraph 5.

Contrary to DuPont's forced interpretation, the remainder of the Agreement is fully in accord with DuPont's liability here. Paragraph 6, for example, demonstrates the parties' intent to protect TLD in the event of specified, but far-reaching, liabilities. "DuPont shall release TLD...from and against any and all cases, claims, demands, liabilities, obligations, causes of action, damages, costs, expenses fines and penalties..." (TLD 203807) The language of this paragraph not only releases TLD "from" such specified liabilities, but "against" such exposures. The term "against" clearly connotes protection, not merely relinquishment (as the word "from" may indicate). Read together with Paragraph 5, as is required under West Virginia law, this language provides further explicit intent to allocate specific risks to DuPont and to protect TLD "against" such risks. (Order Granting Plaintiffs' Motion for Summary Judgment Concerning Defendant DuPont's Duty to Indemnify Defendant T.L. Diamond and Denying DuPont's Motion for Summary Judgment on the Express Indemnity Claim of Defendant T.L. Diamond & Company, Inc. Binder 40, pp. 18362-18373, 9-14-07, hereinafter "Indemnity Order"))

DuPont's argument that the words "and against" are boilerplate "release" language asks this Court to ignore them, reading them out of the Agreement. As shown, that is improper under West Virginia law. Moreover, while DuPont cites various out of state cases

where the "for and against" language was used in connection with releases, it studiously ignores the fact that this Court has uniformly considered the words "and against" in the context of interpreting contracts of indemnity. Eg., Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462 (2002); Harris v. Allstate Ins. Co., 208 W.Va. 359, 540 S.E.2d 576 (2000); Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203, W.Va. 385, 508 S.E.2d 102 (1998).

And in the context of the Agreement, interpretation of Paragraph 6 consistent with a duty to indemnify for third-party liability makes sense. If the only function of that paragraph was to release TLD from claims by DuPont, it could have said that. The scope of Paragraph 6, however, is not so limited. Rather, it protects TLD "from and against any and all" covered liabilities – from any source. Given the enormous pending liability to the State, such an extension was vital to the sort of protection TLD was paying for. A crabbed interpretation that it limited DuPont's liability to TLD would not provide such protection, and indeed would be inconsistent with Paragraph 5, which patently shifted to DuPont all liability to third parties – be it that of DuPont or TLD.

DuPont concedes that Paragraph 8 provides indemnity language but then argues that the lack of similar language in other paragraphs shows that this was the only indemnity mandated by the Agreement. This argument fails to acknowledge the function of paragraph 8. First, many third-party claims could be brought against TLD without DuPont taking action to prompt such claims.[2] If so, Paragraphs 5 and 6 plainly allocate responsibility for those actions to

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[2] TLD has not waived any argument that DuPont's conduct led plaintiffs to include TLD in this action; indeed, much of the evidence adduced at trial relating to DuPont's conduct before and after the Agreement could support such contention. The Court did not have to reach the merits of such an argument and it would be premature to address it here before the Circuit Court had an opportunity to do so.

DuPont. The claims by the State are surely the most obvious example. If the only indemnity mandated by the Agreement were that in Paragraph 8, then the allocation of liability contained in the other paragraphs would be superfluous. Second, Paragraph 8 includes actions "related" to a "Released Claim." Were DuPont to take action that caused TLD to get involved in a case that only "related" to a "Released Claim" but did not actually assert a "Released Claim" against TLD, the language of Paragraph 8 would be necessary to protect TLD in that sort of scenario – the other paragraphs would not necessarily do so.

Finally, the intent to allocate risk to DuPont is consistent in the language of each of these paragraphs. Paragraphs 5, 6 and 8 make DuPont "solely liable." The same is true of Paragraph 7, which DuPont also sidesteps. That paragraph says that "DuPont shall be solely liable for all payments required by the EPA oversight fee invoice dated August 9, 2001, whether assessed against DuPont or TLD." Under DuPont's interpretation, it could have failed to pay that amount, forcing it on TLD, with impunity. Thus, in each of these paragraphs, the relevant context is as to third party liability and, in each instance, the liability is allocated to DuPont. Nothing could be clearer.

Lastly, it is worth noting that Paragraph 9 facially allocates to DuPont the responsibility of costs associated with compliance with specified violations of federal, state or local law. This is entirely consistent with the allocation of risk and protection required under Paragraph 5. Under DuPont's interpretation, however, Paragraph 5 does not require it to protect TLD from the cost of further remedial work while Paragraph 9 would – rendering the two provisions potentially in conflict. The only way to harmonize these two paragraphs is to give them their full and explicit effect – to render DuPont liable for the potential costs and damages referenced in the respective paragraphs of the Agreement.

B. DuPont's Indemnification Obligation Extends to The Claims Asserted by Plaintiffs

Having established that the Agreement requires DuPont to indemnify TLD for third-party liabilities, the remaining issue is as to the reach of that obligation. Here again, of course, the touchstone is the intent of the parties as expressed in their Agreement. The relevant language in Paragraph 5 allocates to DuPont responsibility for "the past, current and future environmental condition of the Real Property, including, **but not limited to** . . . (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property . . ." (TLD 203807)(emphasis added).

DuPont's brief focuses only on a narrow interpretation of subsection (c) but the starting point must be the provision that it assume all liabilities relating to "the past, current and future environmental condition of the Real Property" – language DuPont does not address. Since the entirety of plaintiffs' claim depends on proof of the past environmental condition of the Spelter site, it should be manifest that the claim falls within the broad scope of this language. For avoidance of doubt, Paragraph 5 went on to specify a number of specific, non-exclusive examples of claims relating to the past, current and future environmental condition, among them "liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property."

DuPont's efforts to retroactively cabin the expansive reach of these provisions are unavailing. The "Real Property" acquired by DuPont included not only the land, the enormous "pile" and other contaminated soils on the property but all of the buildings, facilities and equipment used for operations at the site since its inception almost a century ago. Plaintiffs allege that, "from" these buildings (including smokestacks and windows), facilities and

equipment, and "from" the pile and other contaminated soils, "soil, sediment, groundwater [and] surface water" carried contaminants to the surrounding community. *E.g.* Second Amended Class Action Complaint at ¶ 3 ("real properties of Plaintiffs and other area residents have been contaminated with hazardous substances contained within dust, smoke and/or other releases from the Spelter Smelter facility.").

In addition to these community-wide impacts of "environmental conditions" at the site, plaintiffs also specifically implicate the non-exclusive pathways referenced in subsection (c), migration of "soil, sediment, groundwater or surface water from the Real Property." DuPont's argument that by not using the word "airborne," a principal source of contamination from the Site was excluded. This borders on the frivolous. Soils and sediments do not migrate by walking. The record, as noted above, is replete with references to the blowing of contaminated soils and deposited residues. More importantly, subsection (c) confirms that liability relating to offsite migration was a form of liability "relating to the environmental condition of the Real Property." In other words, the transferred responsibility as to the "environmental condition of the Real Property" included both impacts on-site and off-site. The mention of "soil, sediment, groundwater or surface water" in clause (c) were illustrative – the reach of "environmental condition of the Real Property" included such liabilities but explicitly were "not limited to" such specific circumstances.

DuPont's only other argument on this issue makes no sense. They contend that it was the "business" that was responsible for the plaintiff's claims. But the "business" does not have any environmental condition; it is a legal fiction. Thus, the environmental authorities did not require the parties to clean up the "business," it required them to remedy contamination relating to the Real Property. Likewise, DuPont understood that the environmental problems

they were assuming did not relate to the "business," which they were not acquiring, but to the Real Property, which they were acquiring. Thus, when DuPont entered into the Agreement, it acknowledged that it did so "on the basis of DuPont's own investigation of the physical and environmental condition of the Real Property." (TLD 203806) (caps omitted).

Similarly, the plaintiffs do not complain that their homes were contaminated by the "business" but, rather, by the environmental condition of the site, amply characterized by the record, including but not limited to the off-site migration of contaminants "from" the plant and the pile – the physical things that comprised the "Real Property" acquired by DuPont. It does not matter, for purposes of the Complaint, that it was a "business" that managed operations on the Real Property – it was the environmental condition of the Real Property and the physical movement "from the Real Property" to theirs that is the basis for their claim. If the environmental conditions at the Real Property had stayed on the Real Property, plaintiffs could have no claim (although state and federal authorities may still have required a cleanup). In short, it is the "environmental condition" of the Site and attendant migration of contaminants that forms the basis of the claims here and it is liabilities resulting from those conditions and migration that Paragraph 5 expressly allocated to DuPont. Paragraph 6 bore similar language.

So long as the risk is one that was allocated to DuPont, the Agreement protects TLD "against any and all losses, claims, demands, liabilities, causes of action, damages, costs, expenses, fines or penalties (including, without limitation, attorney and consultant fees)." (TLD 203807) DuPont should, at long last, make good on that promise.

C. No Greater Specificity was Required under West Virginia Law

DuPont suggests that a heightened clarity is needed where a contract of indemnity protects a party against its own negligence. This proposition, and Sellers v. Owens-Illinois Glass Co., 156 W.Va. 87, 92, 191 S.E.2d 166, 169 (1972), cited by DuPont, are inapposite to the facts here. First, both Sellers and other cases like it ordinarily involve situations in which an indemnitee is attempting to shift the burden of its sole negligence to the indemnitor. That is not the case here given the allegations, evidence and verdicts below. Indeed, in Sellers, the indemnitor (akin to DuPont here) was found not negligent but the indemnitee was found negligent. Here, of course, DuPont was found liable to plaintiffs and, in fact, solely responsible for their alleged damages. Accordingly, this is not a situation in which the guilty party is trying to offload its own liability to one free of any culpability.

Nor did Sellers dictate that an indemnity obligation contain any specific language or "magic words." Instead, the cases suggest that if liability including negligence was being transferred, the intent to transfer such liability be expressed. That such language is broad, however, does not mean it is without effect. Thus, Sellers cited cases in which courts found the indemnity obligation extended to contracts that, as here, did not include language specifically absolving the indemnitee of its own negligence but were, nonetheless, broad enough to mandate indemnification. Id., 156 W.Va. at 96-97 (citing, Payne v. National Transit Co., 300,. 411 (W.D. Pa.1921) and Eastern Gas and Fuel Associates v. Midwest-Raleigh, Inc., 374 F.2d 451, (4th Cir. 1967). Consistent with those cases, this Court , subsequent to Sellers, upheld and applied the indemnification language of a contract to a party found negligent even though, as here, the language did not purport, on its face, to absolve the indemnitee from its own negligence. Dalton v. Childress Service Corp., supra, 189 W.Va. at 431, 432 S.E.2d at 101.

In Rice v. Pennsylvania R. Co., 202 F.2d 861 (2d Cir. 1953), cited with approval in Sellers, there was no specific reference to indemnification for negligence. Yet, the Second Circuit found that, even though the indemnitee was negligent and despite the lack of certain specific language, the contract required indemnification, because it was obvious given the wording of the agreement that the parties intended to create an obligation to indemnify under the circumstances presented there. Here, as argued above, DuPont agreed to assume the liability for, among other things, the past environmental condition of the Real Property, including off-site migration. Such liability could be alleged to include environmental conditions during the period of TLD's ownership of the property, including conditions and off-site impacts alleged to result from TLD's negligence. The indemnification language here was not conditioned on allegations or findings of culpability one way or the other; rather the touchstone is that there be an asserted liability – a circumstance undeniably present here.

Finally, to the extent DuPont now argues that public policy suggests or warrants a restrictive approach to interpretation for indemnification agreements that protect against one's own negligence – an argument not raised before the Circuit Court -- such concerns simply do not apply here. In each of the cases DuPont cites with respect to indemnity for negligence, the issue was whether the contract in question provided indemnity against future negligence. By contrast, when DuPont and TLD entered into the Agreement, it was in the context of cessation of all operations and sale of the Real Property to DuPont. Negligence by TLD, if any, was then in the past and, unlike each of the cases cited by DuPont, not prospective. No public policy is affected by a post-conduct allocation of responsibility – particularly here, where TLD paid DuPont to assume all such liability.

D. DuPont's Conduct Represents Invited Error

While TLD maintains, for the reasons stated in this response, that the trial court's consideration of the cross-motions for summary judgment in this case was proper, to the extent this Court were to find some error, any such error was invited error. This Court has long recognized this doctrine.

> 'Invited error' is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party for inducing an inappropriate or erroneous [ruling] and then later seeking to profit from that error. The idea of invited error is . . . to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the [proceedings] use the error to set aside its immediate and adverse consequences.

Roberts v. Consolidation Coal Co., 208 W.Va. 218, 228, 539 S.E.2d 478, 488 (2000) (quoting State v. Crabtree, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996)).

"A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syl. Pt. 11, Brooks. v. Galen of W.Va., Inc., 220 W.Va. 699, 649 S.E.2d 272 (2007)(quoting Syl. Pt. 1, Maples v. W.Va. Dep't of Commerce, 197 W.Va. 318, 475 S.E.2d 410 (1996)). "'A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.'" Rourbaugh v. Wal-Mart Stores, Inc., 212 W.Va. 358, 366, 572 S.E.2d 881, 889 (2002)(quoting Syl. Pt. 4, State v. Johnson, 197 W.Va. 575, 476 S.E.2d 522 (1996)).

Two decisions of this Court confirm that a party that makes a motion before a trial court may not later on appeal claim it was error for the court to consider that motion. Wood County Bank v. King, 141 W.Va. 226, 231, 89 S.E.2d 627, 631 (1955); Syl. Pt. 1, McElhinny v. Minor, 91 W.Va. 755, 114 S.E. 147 (1922) ("An appellant cannot complain of errors or

irregularities of the lower court, which were brought about by his own motion, and which he alone caused.").[3]

On appeal, DuPont argues for the first time that the Court's ruling "upended" its "trial defense." This contention is not only factually dubious but represents an obvious form of invited error. Issued shortly after approval of TLD's agreement with plaintiffs, the Circuit Court's Trial Plan deferred the issue of indemnity to the end of the case. Recognizing that TLD would not be at trial to defend itself, however, DuPont defied the Court's Trial Plan and sought instead to clear a path to allow it to point the finger at TLD without fear of rebuttal. With summary judgment in hand and an empty chair next to it at trial, DuPont hoped to be free to deflect as much attention and blame towards TLD as the facts – if any – warranted.

This ploy boomeranged badly. DuPont not only lost its pre-emptive and premature motion but the filing of it induced a successful cross-motion for summary judgment,

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[3] This Court has applied the broad equitable doctrine of invited error in a variety of other circumstances. "'When a party relies in trial court upon a specific ground for relief or in defense, he is bound thereby, and will ordinarily be refused relief in the appellate court on any position inconsistent therewith." Syl. Pt. 5, Clint Hurt & Assoc., Inc. v. Rare Earth Energy, Inc., 198 W.Va. 320, 480 S.E.2d 529 (1996)(per curium)(quoting Syl. Pt. 3., Bush v. Ralphsnynder, 100 W.Va. 464, 130 S.E. 807 (. 1925));A special interrogatory erroneously given to a jury may not be later challenged by a party who agreed to submit that interrogatory. Security Bank of Huntington v. McGinnis, 146 W.Va. 695, 122 S.E.2d 489, 493 (1961); Jury instructions erroneously given may not later be challenged by the party who offered the instruction. Sutherland v. Kroger Co., 144 W.Va. 673, 688, 110 S.E.2d 716, 726 (1959); A party who waives the formal presentation of evidence and consents to the Court's decision based on a proffer of evidence may not later challenge that informal procedure on appeal. Consumer Credit Co. of Waynesburg v. Bowers, 143 W.Va. 748, 754, 104 S.E.2d 869, 874 (1958); A party who moves a document into evidence cannot later object on appeal to the improper admission of that document. Syl. Pt. 3, Wiseman v. Ryan, 116 W.Va. 525, 182 S.E. 670 (1935); "A party cannot complain of admission of an answer responsive to a question propounded to a witness, by himself, on cross-examination." Syl. Pt. 13, Browning v. Hoffman, 90 W.Va. 568, 111 S.E. 492 (1922); A defendant who requests that a trial court engage in an expanded inquiry into a matter is precluded for asserting on appeal that such expanded inquiry was erroneous. Syl. Pt. 3, Vance v. Evans, 11 W.Va. 342 (1877).

leading to the judgment at issue in this narrow appeal. Assuming, for the moment, that the Court's ruling on these motions in fact "upended DuPont's trial defense," as DuPont now complains, it was an utterly self-inflicted wound. Indeed, it is as plain an example of invited error as there could be. Having sought a ruling shortly before that it did not need to make, and indeed was inconsistent with the Circuit Court's Trial Plan, DuPont cannot now be heard to say that the outcome altered its trial strategy.

There is also substantial question that it really did so. There was no indication, prior to trial, that DuPont would or could have cast blame on TLD. First, had it done so, it would have run the risk of violating Paragraph 8 of the Agreement since it could have led to a third party including TLD in a new claim, whether within the instant proceedings or thereafter. Second, DuPont took no steps preparatory to a genuine effort to "contrast its conduct" with TLD's. It never took the deposition of any TLD employee and none of its experts ever offered an opinion as to either the specific contamination associated with TLD's operations or the contribution, if any, TLD's operations had to any class member's property or exposure..

Perhaps more importantly, given the fundamental distinctions between the operations during those periods from the point of view of environmental harm to the class, such contrasts would hardly have been productive. This reality is best demonstrated by the fact that plaintiffs -- with every incentive to blame TLD since DuPont would now bear any liability TLD might incur – barely mentioned TLD at trial. If the plaintiffs advanced no real case against TLD, it is hard to see how DuPont could have. In any event, there were facts before the jury regarding the various periods of operations that the jury could have used to contrast with the "numerous emissions complaints and regulatory violations" alleged to have occurred during TLD ownership. With those facts in hand, the jury still held DuPont 100% responsible.

E. DuPont's Indemnification Obligation Includes Reimbursing TLD for Costs, Expenses and Fees Incurred

As previously discussed, DuPont initially moved for summary judgment with respect to the contractual indemnity of the cross-claim of TLD against DuPont. TLD opposed that motion and contended that it was entitled to recover from DuPont for any liability, damages or expense, including attorney's fees and expenses incurred in connection with this action. Plaintiffs also opposed DuPont's motion for summary judgment on the contractual indemnity claim and moved for summary judgment with respect to its contingent contractual indemnity rights obtained via the settlement agreement between plaintiffs and TLD.

By letter ruling dated August 6, 2007, the Circuit Court denied DuPont's motion for summary judgment and granted the Plaintiffs' Motion for Summary Judgment Concerning Defendant DuPont's Duty to Indemnify Defendant T.L. Diamond. Pursuant to that letter ruling, plaintiffs submitted a proposed Order. DuPont filed objections in opposition to the proposed Order on the grounds that the Agreement did not mandate indemnification in this matter. Although DuPont also objected to the procedure for submitting evidence with respect to the fees and expenses incurred by TLD for a determination as to their reasonableness, DuPont did not challenge that aspect of the Circuit Court's ruling.

Having reviewed the briefs of the parties, on September 14, 2007, the Circuit Court entered an Order Granting Plaintiffs' Motion for Summary Judgment Concerning Defendant DuPont's Duty to Indemnify Defendant T.L. Diamond and Denying DuPont's Motion for Summary Judgment on the Express Indemnity Claim of Defendant T.L. Diamond & Company, Inc. (Indemnity Order, Binder 40, pp. 18362-18373, 9-14-07) It found, as a matter of law, that "DuPont has an obligation to reimburse T.L. Diamond for all such costs, expenses,

attorney fees and consultant fees so incurred in this matter to the extent that such costs, expenses, attorney fees and consultant fees were reasonably incurred in the defense of the claims asserted herein." (Indemnity Order at 9, Binder 40, pp. 18362-18373, 9-14-07). TLD then submitted its petition and supporting verified statements of costs and expenses.[4] DuPont did not object to the reasonableness of those costs and expenses Consequently, on January 14, 2008, the Circuit Court entered Order Granting Defendant T.L. Diamond & Company, Inc.'s Petition for Costs and Expenses (See Order Granting Defendant T.L. Diamond & Company, Inc.'s Petition for Costs and Expenses, hereinafter "Costs and Expenses Order", at 1, Binder 53, 24490-24491, 1-14-08). In the Cost and Expenses Order the Circuit Court recited, among other things, that it was "in receipt of DuPont's Response thereto, filed on or about January 7, 2008, which states no objections to Defendant T.L. Diamond's Motion." Id. The Circuit Court thereafter entered Final Judgment Order Regarding T.L. Diamond & Company, Inc.'s Costs and Expenses which held that TLD should recover from DuPont the sum of $814,949.37. (Costs and Expenses Order, at 2, Binder 53, 24490-24491, 1-14-08). Thus, neither the reasonableness of those costs and expenses, nor the procedure by which the Court determined their reasonableness, was challenged. Although DuPont references the TLD costs and fees in its brief, it has declined to challenge the reasonableness of the costs and fees.

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[4] Depending on the extent of effort required to pursue its rights to indemnity, TLD reserved the right to seek the further attorney's fees and costs necessary to do so, including its costs on appeal. See, Hollen v. Hathaway Electric, Inc., 213, W.Va. 667, 672, 674, 584 S.E.2d 523, 528, 530 (2003)(holding appellant entitled to fees and costs associated with pursuing fees and expenses, including on appeal).

Conclusion

For all of the aforesaid reasons DuPont has breached its various obligations under the Agreement as to TLD to defend, indemnify and assume responsibility for liabilities such as those alleged by plaintiffs. As a result, DuPont is obligated to indemnify TLD under the Agreement both for the averred liabilities related to environmental conditions at the site as well as resulting offsite migration of pollutants. Given the findings below, that obligation requires reimbursement of TLD's costs, expenses and fees reasonably incurred in defending the plaintiffs' claims. T. L. Diamond requests this Honorable Court affirm the Circuit Court's findings granting summary judgment on indemnity, granting TLD's petition for costs and for such other relief as the Court deems proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

E.I. DuPont De Nemours and Company

Petitioner,

v.

Lenora Perrine, et. al.

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 2008, I served the foregoing **Brief of Appellee T. L. Diamond & Company, Inc.** upon all counsel of record and interested parties as follows:

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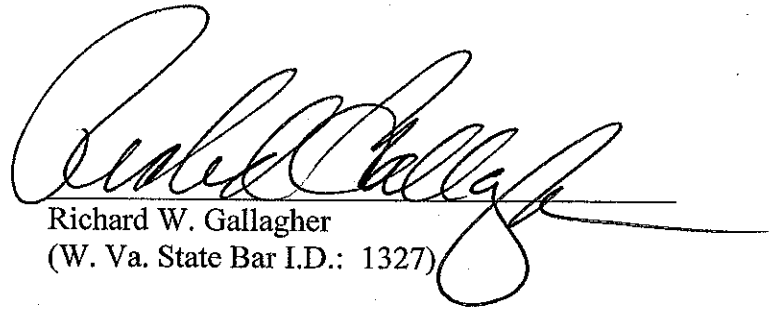

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